Supreme Court, U.S.
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No. 88-2046

In the Supreme Court of the United States

OCTOBER TERM, 1988

KESSEL FOOD MARKETS, INC. AND
KESSEL FOOD STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

COUNSEL OF RECORD:
JOSEPH F. MARTIN
WARNER, NORCROSS & JUDD
900 Old Kent Building
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503
(616) 459-6121
Attorney for Petitioner

OF COUNSEL:
ROBERT J. CHOVANEC
STEPHEN B. GROW
WARNER, NORCROSS & JUDD
900 Old Kent Building
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503
(616) 459-6121

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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ARGUMENT

A. UFCW LOCALS 876 AND 539'S EFFORTS TO REWRITE THE BOARD'S PROCEDURES IN THIS CASE MUST BE REJECTED.

UFCW Locals 876 and 539 (the "Unions") recognize that unless they can divorce the National Labor Relations Board (the "Board") from its 10(j) complaint or water down the Board's declaration of guilt, the Board clearly prejudged Petitioner in violation of due process. The Unions' efforts on both these issues are unsuccessful.

1. Only the Board Is Authorized to Sue for Injunctive Relief Under Section 10(j).

The Board has exclusive authority to sue for injunctive relief under Section 10(j). The Unions' contention that the Board did not itself file the District Court action contradicts the express terms of Section 10(j).[1]

2. The Unions Improperly Identify the Board's Internal Determinations With the District Court Standard for Injunctive Relief.

The Unions ask this Court to infer that, after reviewing General Counsel's ex parte memorandum, the Board decided only that probable cause existed to believe Petitioner violated the Act. The Unions contend that the

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1. *Compare* Section 10(l), 29 U.S.C. § 160(l) which authorizes the Regional Director, on a reasonable cause basis, to file suit for injunctive relief. Section 10(l) provides in relevant part:

> If . . . the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States District Court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter.

District Court's standard for assessing the propriety of a preliminary injunction is, "of course", the standard the Board applies internally in deciding whether to pursue Section 10(j) relief. The Unions, however, offer no support or authority for that proposition. The only public evidence of the Board's private deliberations concerning a particular 10(j) case is the Board's district court complaint. Here, the Board's unequivocal declaration of Petitioner's guilt in federal court demonstrates that the Board *did not* restrict its findings to a reasonable cause determination.[2]

B. AN ADVERSARY HEARING DOES NOT CURE PREJUDGMENT.

The Unions contend that prejudgment, bias, or unfairness are constitutionally permissible so long as an adversary hearing is held after the fact. That proposition would make a mockery of due process and contradict the principles this Court set out in *Withrow v. Larkin*, 421 U.S. 35 (1975).

In *Withrow*, this Court held that an arbiter's preliminary contact with a contested matter must not preclude a fair adversary hearing on the ultimate merits of the dispute. *Withrow*, 421 U.S. at 58. To satisfy basic requirements of due process, an arbiter must reserve judgment until a full adversary hearing is held. This Court

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2. The Unions cite *Levine v. C & W Mining Co.*, 610 F.2d 432 (6th Cir. 1979) for the proposition that the Board merely determines whether reasonable cause exists to believe the Act has been violated. (Union Brief, p.1, 3). It bears noting that the Board's 10(j) petition in *Levine* asserted only a "reasonable cause to believe" that the respondent there had violated the Act. *Levine*, 610 F.2d at 434. Here, on the other hand, the Board declared both a reason to believe *and* its firm conclusion that Petitioner had in fact violated the Act.

recognized, however, that an initial charge or determination of probable cause and ultimate determination have different bases and purposes. *Withrow,* 421 U.S. at 58. As a consequence, in the administrative context:

> . . . there is no incompatibility between the agency filing a complaint based *on probable cause* and a subsequent decision, when all the evidence is in, that there has been no violation of the statute.

Withrow, 421 U.S. at 57. (Emphasis Added).

Withrow did not hold, nor has this Court ever held, that due process merely secures for an accused a chance to change a judge's mind.[3] Here, General Counsel convinced the Board of Petitioner's guilt before Petitioner was asked to present its side of the story. Based on its premature conviction, the Board sued Petitioner in District Court, declaring that Petitioner had violated the Act. To hold that Petitioner's subsequent appeal to the Board satisfies due process would represent a substantial retreat from the principles of fairness that this Court has long championed.

C. THE BOARD'S 10(j) PROCEDURES ARE CONSTITUTIONALLY UNTESTED.

This Court has not considered the constitutionality of the Board's procedures under Section 10(j). The Unions' reliance on *Eisenberg v. Holland Rantos Co.,* 243 N.L.R.B. 726, *aff'd* 583 F.2d 100 (3d Cir. 1978), and *NLRB v. Sanford Home for Adults,* 669 F.2d 35 (2d Cir. 1981),

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3. This Court's opinion in *FTC v. Cement Institute,* 333 U.S. 683 (1947) does not hold otherwise. In that pre-*Withrow* case, this Court held that an administrative agency that reaches and expresses an opinion on a general policy of law is not precluded from applying that policy in a particular controversy.

is misplaced.[4] Neither reported decision reveals whether the Board made an unequivocal declaration of guilt in its District Court pleadings, or merely asserted probable cause to believe a violation had occurred.

D. CONCLUSION.

For these reasons, Petitioner's petition for a writ of certiorari to the Sixth Circuit Court of Appeals should be granted.

Respectfully submitted,

COUNSEL OF RECORD:

JOSEPH F. MARTIN
WARNER, NORCROSS & JUDD
900 Old Kent Building
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503
(616) 459-6121
Attorney for Petitioner

OF COUNSEL:

ROBERT J. CHOVANEC
STEPHEN B. GROW
WARNER, NORCROSS & JUDD
900 Old Kent Building
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503
(616) 459-6121

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4. The Court in *Sanford Home* declined to declare Section 10(j) unconstitutional because doing so would "preclude [the Board] from fulfilling its obligation to review and decide whether unfair labor practices have occurred" pursuant to its congressional mandate. *Sanford Home*, 669 F.2d at 37. Congress' intentions, however, are not the measure of due process.